

The complaint

With the help of a professional representative (PR) Mr N complains that HSBC UK Bank Plc lent to him irresponsibly. For ease, I'll refer mainly to the actions of the PR as being those of Mr N.

What happened

Mr N has had a current account with HSBC since May 1997. At some point the bank agreed an overdraft for him, but due to the passage of time there is no information to show precisely when that was, or what the limit may have been. But we do know that by February 2008, Mr N had an overdraft limit of £1,500. By August 2010, his limit increased to £2,250 and in April 2021 it increased again to £2,500.

On 20 January 2024, Mr N complained to HSBC. He said he had *"remained at the upper limit of their overdraft for a prolonged period and has incurred significant charges of interest as a result."* Mr N said HSBC had failed to properly monitor his account as it is obliged to under various codes and regulations, and it should have noticed he wasn't using the overdraft as intended – for short term emergency borrowing. He said HSBC had failed to assess his ability to afford the overdraft. As a result of these complaint points, Mr N says his credit relationship with HSBC was unfair as described in Section 140A of the Consumer Credit Act 1974 (s.140).

To resolve the complaint, Mr N asked HSBC to refund all charges and interest he'd paid on the account, along with statutory interest of 8% and make a payment for distress and inconvenience. He said the bank should remove any adverse information it has registered with the credit reference agencies.

HSBC looked into Mr N's complaint and issued a final response letter. It said due to the passage of time, it didn't have information from when the overdraft was first agreed. But it said Mr N's account performance showed he could *"support the £2,500 overdraft"*. It said it had monitored his account in line with its obligations and had written to him a few times about his use of the overdraft. HSBC didn't uphold Mr N's complaint.

Mr N didn't agree with HSBC's response, so he referred his complaint to our service. HSBC told us that some of the activity on the account – including lending decisions – dated back more than six years before Mr N raised his complaint. It said that due to the complaint handling rules set by the Financial Conduct Authority (FCA) those activities were outside our jurisdiction, and it didn't consent to our consideration of them.

One of our investigators looked into the complaint. He didn't agree with HSBC that the early part of the complaint was outside our jurisdiction because Mr N had complained that the credit relationship was unfair. He explained this meant we could consider the whole of the relationship. Our investigator looked at the whole complaint but felt the bank hadn't treated Mr N unfairly. He found that HSBC had reached a fair decision to increase his overdraft limit in April 2019 (within the last six years). He said HSBC had monitored Mr N's account, but he didn't think the performance was such that he'd have expected it to intervene. Our investigator didn't uphold the complaint.

Mr N didn't accept our investigator's view of the complaint. He referred to regulations contained in the Conduct of Business Sourcebook (CONC) which set out the expectations for banks with regards to monitoring their customers' accounts. As there was no agreement, the complaint has been passed to me for a decision.

What I've decided – and why

I've considered all the available evidence and arguments to decide what's fair and reasonable in the circumstances of this complaint.

There are time limits for referring a complaint to the Financial Ombudsman Service, and HSBC thinks this complaint was referred to us too late. Our investigator explained why he didn't, as a starting point, think we could look at a complaint about the lending decisions that happened more than six years before the complaint was made. But he also explained that Mr N had complained about his credit relationship with HSBC being unfair as described in s.140, and why this complaint about an allegedly unfair lending relationship had been referred to us in time.

For the avoidance of doubt, I agree with our investigator that I have the power to look at the complaint on this basis. I acknowledge HSBC still doesn't agree, but as I don't think it should be upheld, I don't intend to comment on this further.

In deciding what is fair and reasonable I am required to take relevant law into account. Because Mr N's complaint is also about the fairness of his relationship with HSBC, relevant law in this case includes s.140A, s.140B and s.140C of the Consumer Credit Act 1974.

S.140A says that a court may make an order under s.140B if it determines that the relationship between the creditor (HSBC) and the debtor (Mr N), arising out of a credit agreement is unfair to the debtor because of one or more of the following, having regard to all matters it thinks relevant:

- any of the terms of the agreement;
- the way in which the creditor has exercised or enforced any of his rights under the agreement;
- any other thing done or not done by or on behalf of the creditor.

Case law shows that a court assesses whether a relationship is unfair at the date of the hearing, or if the credit relationship ended before then, at the date it ended. That assessment has to be performed having regard to the whole history of the relationship.

S.140B sets out the types of orders a court can make where a credit relationship is found to be unfair – these are wide powers, including reducing the amount owed or requiring a refund, or to do or not do any particular thing.

Given what Mr N has complained about, I need to consider whether HSBC's decision to lend to him and increase his overdraft limit, or its later actions, created unfairness in the relationship between him and HSBC such that it ought to have acted to put right the unfairness – and if so whether it did enough to remove that unfairness.

Mr N's relationship with HSBC is therefore likely to be unfair if it didn't carry out proportionate affordability checks and doing so would have revealed its lending to be irresponsible or unaffordable, and if it didn't then remove the unfairness this created somehow.

I think there are key questions I need to consider in order to decide what is fair and reasonable in the circumstances of this complaint:

- Did HSBC carry out reasonable and proportionate checks to satisfy itself that Mr N was in a position to sustainably repay the credit?
- If not, what would reasonable and proportionate checks have shown at the time?
- Did HSBC make a fair lending decision?
- Did HSBC act unfairly or unreasonably towards Mr N in some other way?

HSBC had to carry out reasonable and proportionate checks to satisfy itself that Mr N would be able to repay the overdraft. It's not about HSBC assessing the likelihood of it being repaid, but it had to consider the impact of the overdraft on him.

CONC 5.2A.12(1) says a business should consider the customer's ability to make repayments under the agreement "*within a reasonable period*", from income or savings.

There is no set list of checks that it had to do, but it could take into account several different things such as the amount and length of the credit, and the overall circumstances of the borrower.

Did HSBC carry out reasonable and proportionate checks?

Limits agreed up to and including August 2010

We simply don't have any evidence from either party from the time the overdraft was initially agreed, or the increases up to and including the increase to £2,250 in August 2010. I don't find it surprising that no such evidence exists as neither businesses nor consumers are obliged to keep records indefinitely. But it does mean I can't reasonably make a finding on whether appropriate checks were made or if the decisions to lend were fair.

According to HSBC's notes, in March 2020, Mr N applied for an increase in his overdraft to £3,000. The bank asked Mr N to contact it about his application as it had concerns about the sustainability of the limit. He didn't respond to the bank's questions, so the limit wasn't agreed. This tells me that Mr N was aware that HSBC was assessing whether or not the overdraft was affordable for him.

Overdraft limit increase April 2021 from £2,250 to £2,500

When Mr N applied for this increase, he told HSBC he was self-employed, a homeowner and earning £70,000 a year – around £3,850 a month. The bank checked his credit file and, while he had significant debts elsewhere (a total of £48,200 - £17,000 or so of which was revolving debt such as credit cards), he was up to date with his obligations on those.

HSBC calculated Mr N's outgoings to be approximately £3,050, which meant he had monthly disposable income of £800 or so. I've carefully reviewed his bank statement for the year prior to this application and I can't see any signs of financial difficulties. He does use his overdraft, but his account moved to credit regularly and there are what appears to be fairly significant earned income as well as transfers from his own business account.

I think HSBC's checks in the circumstances were reasonable and proportionate for this modest increase in his overdraft. Based on my review of his statements I think Mr N would have been able to repay the limit in a reasonable period of time if he was called upon to do so. All things considered, I don't think HSBC acted unfairly by agreeing this increased limit for Mr N.

Did HSBC act unfairly or unreasonably towards Mr N in some other way?

Mr N has referred to regulations contained in CONC which set out the expectations for

banks with regards to monitoring their customers' accounts.

CONC 5D.2 says:

"A firm must establish, implement and maintain clear and effective policies, procedures and systems to:

(1) monitor and review periodically the pattern of drawings and repayments of each of its customers under an arranged overdraft or an unarranged overdraft, and other relevant information held by the firm; and

(2) identify as early as possible, by reference to an appropriate collection of factors that take account of any relevant information held by the firm, any customers in respect of whom there is a pattern of repeat use, and then sub-divide those customers into the following two categories:

(a) customers in respect of whom there are signs of actual or potential financial difficulties;

(b) all other customers who show a pattern of repeat use (that is, all customers within CONC 5D.2.1R(2) who are not in category (a))."

CONC 5D.2.3(5) sets out indicators which may be considered as signs of financial difficulty alongside repeated use of an overdraft and they include *"an upward trend in a customer's use of the overdraft over time, having regard to one or both of...the number of days of use per month; and the value of the customer's borrowing"*.

CONC 5D.3 sets out what a bank must do if it identifies repeat use of an overdraft where a customer is showing signs of actual or potential financial difficulty.

While the CONC rules set out above didn't come in until December 2019, there were similar rules in place prior to that in expired sections of CONC and elsewhere. But as most of the statements I can review are covered by CONC 5D, I'll focus mainly on those.

Banks generally review accounts on an annual basis. Given HSBC increased Mr N's overdraft in August 2010, I've considered the next annual review was likely to be August 2011 and annually thereafter, until the increase in April 2021.

We only have bank statements for Mr N's account with HSBC dating back as far as June 2015, so I can't reasonably make any findings about an annual review until August 2016 as I don't have enough data.

For the year to August 2016, Mr N seems to run his account well. There are regular significant transfers from his business account and the account returned to credit. I can't fairly make any finding on Mr N's account performance for the year to August 2017 as I don't have statements from August 2016 to March 2017.

As mentioned above, I do have full statements of the account from May 2017 to April 2024, so I have been able to consider reviews throughout that period.

Mr N's account showed regular payments of several thousand pounds each month into his account which appear to be his salary. This was sufficient to cover his essential spending, and his account returned to credit regularly. There is evidence of quite large amounts of discretionary spending which meant he used his overdraft for a significant amount of time too.

I can see that in February 2023, Mr N exceeded his overdraft which led to a couple of small direct debits being returned unpaid. The bank wrote to him about that and asked him to contact it if he needed help. I've not seen any further unpaid items or any indication that he contacted the bank to discuss the situation.

HSBC wrote to Mr N in June and December 2023 offering help with his overdraft usage, but there is no sign in the bank's notes that he contacted it for help until he raised his complaint in January 2024.

I've carefully reviewed the available statements for Mr N's account and the actions taken by the bank. Having done so, I've seen nothing which makes me think that it ought to have thought he was in financial difficulties such that would mean I'd expect it to intervene more than it did.

If Mr N finds himself in financial difficulties now, I would encourage him to talk to HSBC. I would remind HSBC of its obligation to treat customers in difficulty fairly.

My final decision

My final decision is that I don't uphold this complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr N to accept or reject my decision before 7 July 2025.

Richard Hale
Ombudsman